DEVAN NAIR v. YONG KUAN TEIK

[P.C. (Viscount Dilhorne, Lord Pearce and Lord Upjohn) January 11, 1967]

[Privy Council Appeal No. 33 of 1965]

Election petition — Service of — Person returned leaving no address for service — Petition left at office of registrar within statutory period — Publication in Gazette outside period — Whether valid service — Publication mandatory under rules — Election Offences Ordinance, 1954, ss. 33 & 36, Sch. 2, rr. 10 & 15 — Courts of Judicature Act, 1964, s. 74.

Practice and Procedure — Federal Court — Jurisdiction — Election petition — Interlocutory order — Election judge striking out petition for failure of service — Leave to appeal on basis that order was interlocutory — Jurisdiction of Federal Court to entertain appeal — Effect of leave to appeal to Privy Council — Courts of Judicature Act, 1964, s. 67.

Constitutional Law — Parliament — Election petition — Service of — Inconsistent rules.

Interpretation — Mandatory and directory provisions — Distinction between.

This was an appeal from the decision of the Federal Court ([1965] 2 M.L.J. 162) which reversed the decision of Ismail Khan J. ([1964] M.L.J. 456). The appellant was the successful candidate in an election to the Dewan Ra'ayat held on April 25, 1964. The result of the election was duly published in the *Gazette* on June 11, 1964 and on June 29, 1964, within the required 21 days, the respondent presented to the Registrar of the High Court an election petition claiming that the appellant's election was invalid on the ground that he was disqualified in that he was not at the time a citizen of Malaysia. The appellant had not appointed a solicitor nor left an address for service, therefore the respondent acting under rule 10 of the Election Rules in Schedule 2 of the Ordinance, lodged a copy of the petition on the registrar on the last day of service prescribed by rule 15. He further advertised a notice of presentation of the petition in the *Gazette* on July 23, 1964, after the 10-day period required by that rule. The election judge struck out the petition on the ground that it had not been served in accordance with the rules and considering that his order was interlocutory, he gave leave to appeal under section 68(2) of the Courts of Judicature Act. The Federal Court set aside his decision but gave leave to appeal to the Privy Council.

Held: (1) if the election judge made a final order it was unappealable, but upon the footing that his order was interlocutory, it was open to the election judge to give leave to appeal and the Federal Court to entertain it. While the Privy Council would not entertain an appeal after a final determination of an election petition, the Federal Court, in giving leave to appeal under section 74 of the Courts of Judicature Act, conferred upon the Privy Council jurisdiction to entertain the interlocutory appeal;

(2) although lodgment of the petition on the registrar was a literal compliance with rule 10 there was, in respect of service of petitions, an inconsistency between rules 10 and 15 and in view of the explicit provisions of rule 15, service in accordance with rule 10 was insufficient and a petition must be served in accordance with the terms of rule 15. The terms of rule 15 were mandatory, and not merely directory, and therefore, there being no personal service and the advertisement in the *Gazette* being out of time, the proceedings were a nullity: no weight could be attributed to the circumstances that the rules contained no express power to strike out a petition for non-compliance with rule 15 and an election judge had an inherent power to cleanse his list by striking out, or better, by dismissing those petitions which had become nullities by virtue of failure to serve the petition within the time prescribed by the rules.

Per curium: Their Lordships are reluctant to entertain interlocutory appeals, especially in election petitions, and unless the case raised is of exceptional public and general importance the Federal Court may well think it wiser to leave the party aggrieved to apply to the Board for special leave to appeal under section 74(2) of the Courts of Judicature Act. The present case, however, does raise a question of exceptional public importance on the proper interpretation of the rules relating to election petitions.

Cases referred to:—

(1) *Senanayake* v. *Navaratne* [1954] A.C. 640; [1954] 3 W.L.R. 336; [1954] 2 All E.R. 805, P.C.

(2) *Arzu* v. *Arthurs* [1965] 1 W.L.R. 675, P.C.

(3) *Theberge* v. *Laudrey* (1876), 2 App. Cas. 102, P.C.

(4) *Kennedy* v. *Purcell* (1888), 59 L.T. 279, P.C.

(5) *Strickland* v. *Grima* [1930] A.C. 285; 46 T.L.R. 194, P.C.

(6) *Harmon* v. *Park* (1880), 6 Q.B.D. 323, C.A.

(7) *Monkswell* v. *Thompson* [1898] 1 Q.B. 353, C.A.

(8) *In re Pritchard* [1963] Ch. 502; [1963] 2 W.L.R. 685; [1963] 1 All E.R. 873, C.A.

(9) *Williams* v. *Mayor of Tenby & Ors.* (1879), 5 C.P.D. 135.

In addition to the above, the following cases were also cited in argument: *Falkland Islands Co.* v. *The Queen* (1864), 1 Moore P.C.C.N.S. 299; *Valin* v. *Langlois* (1879), 5 App.Cas. 115; *Da Silva* v. *Attorney-General* (1949), 50 N.L.R. 481; *Patterson* v. *Solomon* [1960] A.C. 579; *Montreal Street Rly. Co.* v. *Normandin* [1917] A.C. 170; and *Fry* v. *Moore* (1889), 23 Q.B.D. 395.

PRIVY COUNCIL APPEAL.

J. G. Le Quesne Q.C. and *Mervyn Heald* for the appellant.

John Baker for the respondent.

The judgment of their Lordships was delivered by,

Lord Upjohn: This appeal from the Federal Court of Malaysia is concerned with an election petition launched by the respondent on the 29th June 1964 against the appellant, who was a candidate for election to the Dewan Ra'ayat at the election held on the 25th April 1964, claiming that his election was invalid on the ground that he was disqualified at the time, in that he was not at that time a citizen of Malaysia. Election petitions are governed by Part VII of the Election Offences Ordinance No. 9 of 1954 and by the rules made thereunder which are contained in the Second Schedule to that Ordinance.

The appellant alleged before the election judge (Ismail Khan J.) that the petition had not been served upon him in accordance with the rules, the judge ruled in his favour and, by order dated 26th Septeaber 1964, struck out the petition. He gave leave to appeal to the Federal Court who reached a contrary conclusion and

allowed the appeal of the respondent. The Federal Court gave leave to appeal to their Lordship's Board.

Two quite independent questions are raised by this appeal. First, whether any appeal to the Federal Court or to their Lordships' Board is competent.

Secondly, if any such appeal is competent, whether upon the true construction of the rules concerning the service of petitions the election judge was right in thinking that the relevant rule was mandatory, or whether he was rightly overruled by the Federal Court, who held it was directory only.

Constitutionally decisions on questions of contested elections are vested in the Assembly for which the contested election has been held, but in the course of the nineteenth century many countries, including this country and many of Her Majesty's possessions overseas, adopted the view that, as the deliberations of the Assembly itself were apt to be governed rather by political considerations than the justice of the case, it was right and proper that such questions should be entrusted to the courts. This required legislation in every case, and in many cases the right of appeal after the hearing of an election petition by an election tribunal to which those hearings was entrusted were severely limited clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment. But essentially the question whether there is any limitation upon the right of appeal must depend upon the terms of the enactment setting up the election tribunal. These are to be found in sections 33 and 36 of the Election Offences Ordinance which as amended in 1959 are so far as relevant as follows:—

"33. (1) Every election petition shall be tried by the Chief Justice or by a Judge of the High Court nominated by the Chief Justice for the purpose . . .

(4) Unless otherwise ordered by the Chief Justice, all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the High Court.

36. At the conclusion of the trial of an election petition the Election Judge shall determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination —

(a) to the Election Commission in the case of an election of a person to be a member of the Dewan Ra'ayat, a Legislative Assembly, the municipal council of the federal capital or of any other election that the Election Commission may be authorised to conduct; or

(b) in the case of any other election, to the Ruler or Governor of the State.

Upon such certificate being given such determination shall be final; and the return shall be confirmed or altered, or the Election Commission or the Ruler or Governor (as the case may be) shall within one month of such determination give notice of election in the constituency, electoral ward or electoral district concerned, as the case may require, in accordance with such certificate."

Section 67 of the Courts of Judicature Act 1964 of Malaysia is also important upon the question of appeals.

"The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals shall be brought."

On the footing that the order of Ismail Khan J. on 26th September 1964 was a final order it seems clear to their Lordships that there was no right of appeal to the Federal Court or to their Lordships' Board.

There was none to the Federal Court because, although on a narrow construction of section 36 it might be argued that the right of appeal was thereby limited only after a hearing on the merits, it has been established by two decisions of their Lordships' Board that the section applies to all cases where there has been a final determination of the matter whether it be on procedural grounds or upon the merits. The first is *Senanayake* v. *Navaratne* [1] where Lord Simonds, delivering the judgment of the Board, said at p. 651:—

"They are satisfied that the election judge, as established by the Order-in-Council of 1946, was a tribunal with a jurisdiction, not only to determine finally the question whether the corrupt practices alleged in the petition had been committed, but also to determine finally whether, upon the true construction of the Order-in-Council, it was competent in the circumstances for the petitioner to maintain his amended petition."

That case was not dissimilar to that before their Lordships, for the question was whether the petitioner had amended his petition within the proper time for service. The second is *Arzu* v. *Arthurs* [2] the petitions were dismissed on the ground that they did not state when they were served and that the first respondent had not been made a respondent thereto. Lord Pearce, delivering the judgment of the Board, said at p. 679:—

"Nor can they find a distinction in the fact that the dismissal of the petitions was based on procedural grounds. If the decision in this peculiar jurisdiction is to be final such finality must apply irrespective of the reasons for the decision. The fact that no evidence has been heard does not affect the general principle. The court in the present case did not refuse jurisdiction; it decided in its peculiar jurisdiction that the petitions were defective. As a result the petitions were dismissed. A dismissal based on a procedural matter is none the less a decision in an election petition, even where the matter has not proceeded to the hearing of evidence."

It is to be noted that in both these cases, the first from Ceylon and the second from British Honduras, the statutory provisions were for all

relevant purposes indistinguishable from the provisions of section 36.

There was no appeal to their Lordships' Board for it has been settled by a long line of decisions of their Lordships starting with *Theberge* v. *Laudrey* [3] in 1876 and ending with *Arzu* v. *Arthurs, supra,* in 1964 that their Lordships will not entertain appeals from the determination of an election judge.

The reason for this was put very neatly by Lord Hobhouse in *Kennedy* v. *Purcell* [4] at 280 referring to *Theberge* v. *Laudrey, supra*:—

> "The decision of the Judicial Committee was, not that the prerogative of the Crown was taken away by the general prohibition of appeal, but that the whole scheme of handing over to courts of law disputes which the Legislative Assembly had previously decided for itself showed no intention of creating tribunals with the ordinary incident of an appeal to the Crown."

But the underlying reason for this line of decisions was, as the authorities shew, the recognition of the necessity for a speedy determination of an election issue. So if in this case Ismail Khan J. made a final order it was unappealable. But whether or not his order was final or interlocutory does not seem to have been canvassed in the courts below. It appears from the notes of Ismail Khan J. upon the argument before him on the 26th September 1964 that in striking out the petition both he and the parties considered that he was making an interlocutory order, for reference was made to section 68(2) of the Courts of Judicature Act 1964 which deals only with interlocutory appeals and he gave leave to appeal thereunder. Whether he was right so to treat his order is a matter which their Lordships do not decide; they think it is a doubtful point and it would have been better if in terms he had dismissed the petition when no question could have arisen. They will assume that he was right in thinking that for the purposes of the appeal he was making an interlocutory order. This point was very properly drawn to their Lordships' attention by counsel for the respondent.

The question, then, is whether the general rules that their Lordships have already stated in relation to orders made in election petitions in regard to final orders, applies to interlocutory orders. This must depend to some extent upon the true construction of section 33 which deals with interlocutory matters. Counsel for the appellants pressed their Lordships with the words in section 33(4) that all interlocutory matters in connection with an election petition may be "dealt with and decided by" any judge. It was argued that the word "decided" meant "finally decided", and reliance was placed upon the case of *Strickland* v. *Grima.* [5]

That, however, was a very different case where His Late Majesty by Letters Patent referred to the Court of Appeal in Malta, the highest judicial tribunal in that island, the right to decide certain contested election matters. The inference was drawn that no right of appeal was intended. Their Lordships, however, do not think that the construction adopted in that case is really of assistance to them in this case. Looking at sections 33 and 36, while it is clear that section 36 enacts that final orders are not subject to appeal, there are no such limiting words in section 33(4), and it does not seem to their Lordships there is to be found in that section sufficient to overcome the express words of section 67 of the Courts of Judicature Act 1964 already quoted, so as to preclude the bringing of an appeal in an interlocutory matter. This may seem to be curious but, nevertheless, until the law was later altered by statute the same situation arose in this country. In *Harmon* v. *Park* [6] it was held that although an appeal from the election judge to the Common Pleas Division on a case stated was final, yet upon an interlocutory matter it could be considered by the Court of Appeal. This was followed in *Monkswell* v. *Thompson.* [7] Accordingly, upon the footing that the order was interlocutory, in their Lordships' opinion, it was open to the election judge to give leave to appeal and for the Federal Court to entertain it.

While it is clear for the reasons already given that their Lordships would not entertain an appeal after a final determination of an election petition, the authorities do not cover the case of an interlocutory appeal and their Lordships must examine the matter afresh. When the Federation of Malaya became independent in 1957 the United Kingdom Federation of Malaya Independence Act 1957 by section 3 provided that Her Majesty by Order in Council might confer on the Judicial Committee of the Privy Council jurisdiction in respect of appeals from the Supreme Court of the Federation as might be appropriate for giving effect to any arrangements made between Her Majesty and the Head of the Federation for reference of such appeals to their Lordships.

Such arrangements were concluded in 1958 and by Her Majesty's Federation of Malaya (Appeals to Privy Council) Order in Council 1958 and by the Appeals from the Supreme Court Ordinance 1958 of the Yang di-Pertuan Agong, it was enacted in identical terms that subject to any enactments or rules regulating the proceedings of the Judicial Committee in respect of the Supreme Court, an appeal should lie from the court to the Yang di-Pertuan Agong with the leave of the court

> "(b) from any interlocutory judgment or order which the court considers a fit one for appeal."

The court was defined as the Supreme Court.

The Federation of Malaya is now Malaysia and the Supreme Court is now the Federal Court and the relevant enactment is now (in identical

terms) to be found in section 74 of the Courts of Judicature Act 1964.

The Federal Court gave leave to appeal and thereby, as it appears to their Lordships, conferred upon them jurisdiction to entertain this interlocutory appeal.

Nevertheless, their Lordships would like it to be understood that they are reluctant to entertain interlocutory appeals especially in election petitions and unless the case raised is of exceptional public and general importance the Federal Court may well think it wiser to leave the party aggrieved to apply to their Lordships' Board for special leave to appeal under section 74(2) of the Courts of Judicature Act 1964.

This case, in their Lordships' opinion however does raise a question of exceptional public importance on the proper interpretation of the Rules relating to election petitions set out in the Second Schedule to the Election Offences Ordinance and their Lordships' decision may also govern the practice and procedure in other parts of the Commonwealth which have adopted a similar code of procedure.

Their Lordships now proceed to consider the second question stated at the beginning of their judgment. Section 38 of the Election Offences Ordinance provides that every election petition shall be presented within 21 days of the publication of the result of the election in the *Gazette*.

The rules principally relevant are rules 10 and 15.

"10. Any person returned may at any time, after he is returned, send or leave at the office of the Registrar a writing signed by him on his behalf '[*sic*]' appointing an advocate and solicitor to act as his solicitor in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within the Federation at which notices addressed to him may be left, and if no such writing be left or address given, all notices and proceedings may be given or served by leaving the same at the office of the Registrar. . . ."

"15. Notice of the presentation of a petition, accompanied by a copy thereof, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the solicitor appointed by the respondent under rule 10 of these Rules or by posting the same in a registered letter to the address given under rule 10 of these Rules at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no solicitor has been appointed, or no such address given, by a notice published in the *Gazette* stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar."

The result of the election was published on the 11th June 1964 and the petition was presented to the Registrar of the High Court as prescribed by rule 3 on 29th June 1964 within the required 21 days.

The respondent did not avail himself of rule 10 by appointing an advocate and solicitor to act for him nor leave any address for service.

As the respondent had left no address for service the petitioner in purported compliance with rule 10 lodged a copy of the petition on the Registrar on the last day for service of the petition prescribed by rule 15.

Notice of presentation of the petition was advertised in the *Gazette* on 23rd July 1964. This notice was clearly out of time. The first question is whether lodgment of the petition on the Registrar was a sufficient compliance with the rules. That was a literal compliance with rule 10 but it appears to their Lordships that in respect of service of petitions there is an inconsistency between rules 10 and 15; in view, however, of the very explicit provisions of rule 15 (which itself refers to rule 10) it appears clear to their Lordships that a petition must be served in accordance with the terms of rule 15 and that service thereof merely in accordance with rule 10 is insufficient.

Rule 15 was not complied with strictly for there was no personal service and no notice in the *Gazette* within 10 days of the presentation of the petition. Although the *Gazette* is only published fortnightly, it would have been possible to comply with the rule by publishing it in the issue of the 9th July.

So the whole question is whether the provisions of rule 15 are "mandatory" in the sense in which that word is used in the law, *i.e.*, that a failure to comply strictly with the times laid down renders the proceedings a nullity; or "directory" *i.e.*, that literal compliance with the time schedule may be waived or excused or the time may be enlarged by a judge. If the latter, it cannot be doubted that the respondent has waived literal compliance by taking a step in the action, that is, by asking for particulars of the petition.

This question is a difficult one as is shown by the conflict of opinion in the courts below.

The circumstances which weigh heavily with their Lordships in favour of a mandatory construction are:

(1) The need in an election petition for a speedy determination of the controversy, a matter already emphasised by their Lordships. The interest of the public in election petitions was rightly stressed in the Federal Court, but it is very much in the interest of the public that the matter should be speedily determined.

(2) In contrast, for example, to the Rules of the Supreme Court in this country, the rules vest no general power in the election judge to extend the time on the ground of irregularity. Their Lordships think this omission

was a matter of deliberate design. In cases where it was intended that the judge should have power to amend proceedings or postpone the inquiry it was expressly conferred upon him, see for example rules 7, 8 and 19.

(3) If there is more than one election petition relating to the same election or return, they are to be dealt with as one (rule 6). It would be manifestly inconvenient and against the public interest if by late service in one case and subsequent delay in those proceedings the hearing of other petitions could be held up.

(4) Respondents may deliver recriminatory cases (rule 8) and speedy service, in order that the respondent may know the case against him, is obviously desirable so that he may collect his evidence as soon as possible.

With regard to the authorities, for the reasons given in (2) above many of them such as *In re Pritchard* [8] do not assist the determination of this case.

The case of *Williams* v. *Mayor of Tenby and Others* [9] which has stood the test of nearly 90 years and seems to their Lordships plainly rightly decided, strongly supports the view that the provisions of rule 15 were mandatory.

On the whole matter their Lordships have reached the conclusion that the provisions of rule 15 are mandatory, and the petitioner's failure to observe the time for service thereby prescribed rendered the proceedings a nullity.

With all respect to the Federal Court their Lordships cannot attribute weight to the circumstance that the rules contained no express power to strike out a petition for non-compliance with rule 15.

When there is a withdrawal by a party it is obviously desirable that the rules should make provision for such an event and that it should receive due publicity by publication in the *Gazette* but, if the proceedings never begin in any real sense by reason of the failure to serve the petition, there seems no compelling reason for any formal order. The Election Judge must, however, have an inherent power to cleanse his list by striking out or better by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the Rules.

For these reasons their Lordships will report to the Head of Malaysia their opinion that the appeal should be allowed and the petition of the respondent dismissed and that the respondent should pay the appellant's costs of this appeal and in the courts below.

Appeal allowed.

Solicitors: *Coward, Chance & Co.; Garber, Vowles & Co.*

NORATA SINGH v. SERDARA SINGH

[F.C. (Tan Ah Tah F.J., Buttrose and Winslow JJ.) January 20, 1967]

[Singapore — Federal Court Civil Appeal No. Y6 of 1966]

Practice and Procedure — Appeal — Principle on which the appellate court may interfere with lower court's findings of fact — Trial judge accepting plaintiff's evidence and rejecting the evidence of the defendant and his witness's evidence — No ground for setting aside decision based on credibility.

In this action the plaintiff/respondent, a moneylender, claimed the sum of $6,385.91 from the defendant/appellant, also a moneylender, being principal and interest due under a promissory note dated the 2nd July, 1964, whereby the defendant agreed to pay the plaintiff on demand $6,000 being money lent by the plaintiff to the defendant on that date and interest thereon at 18 per centum per annum until payment. There was a sharp conflict of evidence as to the facts. The plaintiff's case was that the sum of $6,000 was actually lent by him to the defendant while the defendant's case was that a sum of only $2,000 was in fact lent. After carefully considering the matter the learned trial judge came to the conclusion that the plaintiff's version of the incident was true and the defendant's false. He accordingly gave judgment in favour of the plaintiff. It is from that judgment that the defendant appealed.

Held: (1) before the appellate court can reject the learned trial judge's estimate of credibility of the witnesses it must be satisfied that his view was plainly wrong and that any advantage he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion;

(2) once the learned trial judge arrived at the conclusion that the plaintiff was speaking the truth and the defendant and his witnesses were lying and expressly said so in his judgment there is nothing more left to say.

Cases referred to:—

(1) *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87.

(2) *Thomas* v. *Thomas* [1947] A.C. 484, 487.

(3) *Clarke* v. *Edinburgh & District Tramways Co. Ltd.* [1919] S.C. (H.L.) 35.

(4) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326.

FEDERAL COURT.

J. B. Jeyaretnam for the appellant.

P. Coomaraswamy (*S. K. Chan* with him) for the respondent.

Cur. Adv. Vult.

Buttrose J.: In this action the plaintiff, a moneylender, claimed the sum of $6,385.91 from the defendant, also a moneylender, being principal and interest due under a promissory note dated the 2nd July, 1964, whereby the defendant agreed to pay the plaintiff on demand $6,000 being money lent by the plaintiff to the defendant on that date and interest thereon at 18 per centum per annum until payment.